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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C., 20554**

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

DOCKET FILE COPY ORIGINAL

**Request for Declaratory Ruling
Regarding Demarcation Point at
Washington Dulles International Airport**

File No.

**Reply of Metropolitan Washington Airport Authority
To Opposition of GTE South Incorporated**

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In re Application of)
)
METROPOLITAN WASHINGTON)
AIRPORTS AUTHORITY)
) File No.
Request for Declaratory Ruling Regarding)
Demarcation Point at Washington Dulles)
International Airport)

**Reply of Metropolitan Washington Airports Authority
to Opposition of GTE South Incorporated**

The Metropolitan Washington Airports Authority ("Authority") has requested the Commission to issue a declaratory ruling confirming that the demarcation point at Dulles International Airport ("Dulles") is on the airport side of a new frame at building 8. GTE South Incorporated ("GTE") advances a variety of objections in opposition to this request, some of which involve matters outside of the Commission's jurisdiction,^{1/} others of which are just wrong and still others of which are both. There is one--and only one--issue for the Commission to decide: whether the Authority is entitled to insist upon a single demarcation point at the minimum point of entry at building 8. The Authority contends that this result is mandated by the terms and purposes of Section 68.3 of the Commission's rules, and special considerations uniquely applicable to Dulles. In this

^{1/} We freely concede that, insofar as the Authority's shared tenants system ("STS") may be engaged in the provision of intrastate telecommunication services, the regulatory status of the system is determinable by the Virginia State Corporation Commission. Regardless of the regulatory status of the Authority under Virginia law, the fact remains that the Authority, as premises owner, is entitled to a determination of a demarcation point; and GTE's arguments invoking Virginia law are simply irrelevant.

reply we show that GTE's contentions with respect to the application of Section 68.3 to this case are without merit, and respond to the collateral issues advanced by GTE only insofar as they are relevant to that issue.^{2/}

I. THE COMMISSION'S RULES AND POLICIES ENTITLE THE AUTHORITY TO INSIST UPON A SINGLE DEMARCATION POINT ON ITS PROPERTY

A. Section 68.3 and Its Purpose Confirm That The Authority May Insist Upon A Single Demarcation Point. Subsection 68.3 paragraph (b)(2) states unequivocally that :

The multiunit premises owner shall determine whether there shall be a single demarcation point location for all customers or separate locations for each customer

47 C. F. R. Section 68.3 (definition of demarcation point, paragraph (b)(2))(1995). The Authority maintains that this sentence entitles it to designate building 8 as the demarcation point for Dulles. GTE's claim that this sentence applies only if the telephone company does not have a reasonable and nondiscriminatory policy of placing the demarcation point at the minimum point of entry (Opposition of GTE at 7-8. ("GTE Opposition")) is wrong. Indeed, the sentence set forth above applies only when the telephone company does have a non-discriminatory minimum point of entry policy.

^{2/} We do, however, categorically reject GTE's suggestion that the Authority has acted in bad faith in this matter and its claim that the Authority is seeking to "stifle competition." GTE Opposition at 19-22. The Authority's decision to institute shared tenant service was to assure that it, and its tenants, would be able to avail themselves of the choices of service and service providers that competition offers, through a state of the art infrastructure. The rest of the history of this dispute speaks for itself.

This is clear from the structure and language of the rules. The determination of demarcation points in cases in which the telephone company declines to adopt a minimum point of entry policy is dealt with in its entirety by the sentence of Subsection (b)(2) that immediately precedes the sentence quoted above:

“If the telephone company does not elect to establish a practice of placing the demarcation point at the minimum point of entry, the multiunit premises owner shall determine the location of the demarcation point or points.”

47 C.F.R. § 68.3(b)(2) (emphasis supplied). This gives premises owners all of the authority they need to determine a “single demarcation point” or separate such points if the telephone company has not adopted a policy limited to the minimum point of entry. GTE’s interpretation of the “structure” of the rule (Opposition at 8) would render the penultimate sentence of the rule superfluous, in contravention of the most basic canons of statutory interpretation.

Moreover, there is a reason, embedded in the text of Section 68.3, for permitting the premises owner to choose between a “single” demarcation point and “separate” demarcation points in cases where the telephone company’s policy is based upon the minimum point of entry. The Commission explained its definition of the minimum point of entry in the following terms:

The minimum point of entry is defined as, and may be, either (1) where the wiring crosses the property line or (2) where the wiring enters a building or buildings.

The Matter of Section 68.104 and 68.213 of the Commission’s Rules, 5 F.C.C.R. 4686 at 4693 (1990)(the “Demarcation Order”). Note that the two categories of locations are mutually exclusive. Note also, however, that there are options within each of the two

categories of locations encompassed by the definition. In this case, the minimum point of entry under category (2) is either “a building or buildings.” It is true (assuming that GTE has an eligible policy) that GTE’s policy “shall determine which of (1) or (2)” applies, Demarcation Order, 5 F.C.C.R. at 4707 fn. 29. However, the penultimate sentence of paragraph (b)(2) empowers an owner that is limited by a minimum point of entry policy to select the location within the category chosen by the telephone company and to thus decide whether the demarcation point shall be at a “building” or at “buildings.”^{3/} As it is entitled to do, the Authority has selected the former.

The Authority does not concede that GTE has a non-discriminatory demarcation policy. As it has been described (but still not fully disclosed) by GTE, the policy does not specify “which of (1) or (2)” applies to multi-premise locations such as Dulles. A policy which provides for a demarcation point at “building(s)” in the case of “multiunit locations”, and states that the point is “normally” at “each building” in “campus” situations invites discrimination in application and is neither reasonable nor what the Commission intended when it adopted the minimum point of entry rule. It is not, however, necessary for the Commission to reach that issue, for the Authority is entitled to designate building 8 as the demarcation point for Dulles under the penultimate sentence of the rule, which gives it the power to select “a building” as the demarcation point even assuming GTE’s policy is non-discriminatory.

^{3/} By contrast, if the telephone company does not have an eligible policy, the premises owner “is not limited by or subject to” the minimum point of entry definition. Demarcation Order, 5 F.C.C.R. at 4693.

This result is supported by the basic policies that underlie the rule. On the one hand, the Commission was concerned that, absent limiting conditions, telephone companies would attempt to establish a demarcation point at a very substantial distance from the facility or facilities seeking service. Thus, the first sentence of footnote 29 of the Demarcation Order limits the discretion of the telephone company to establish a reasonable and non-discriminatory policy:

The carrier has discretion to place the demarcation point only in accordance with the definition of the minimum point of entry.

Demarcation Order, 5 F.C.C.R. at 4707, fn. 29. On the other hand, the Commission was concerned, as this very case exemplifies, that its minimum point of entry definition not interfere with the ability of a premises owner to “select a service configuration” best suited to its campus or facility. Demarcation Order, 5 F.C.C.R. at 4707, fn. 31. GTE contends that this statement deals only with matters “as between owner and tenant” and “does not address demarcation points as between the multipremises owner and the LEC.” GTE Opposition at 8, footnote 7. The text does not support this argument:

In other words, in most cases it will be the multiunit property owner’s ability to select the configuration of demarcation points that is the necessary precondition for increasing the customer’s ability in a multiunit situation to perform inside wiring operations. Therefore, allowing the multiunit property owner to select the service configuration of the multiunit property will promote the customer’s ability to perform inside wiring operations even if the multiunit property owner is not a customer.

Demarcation Order, 5 F.C.C.R. at 4707, fn.31. (Emphasis supplied.)

The exact issue in this case is the Authority’s ability “to select the configuration of demarcation points” best suited to its and its tenants needs to enjoy a state of the art

infrastructure. The penultimate sentence of the rule exists precisely to allow the Authority to make that selection. The selection the Authority has made accords with the terms of the rules and its purpose.

B. The Establishment of a Single Demarcation Point Is Supported by Special Consideration Uniquely Applied to This Case. The establishment of a single demarcation point at Dulles is supported by three considerations uniquely applicable here.

First, the Authority's insistence upon a single demarcation point is strongly influenced by security and public safety needs. GTE urges the Commission to dismiss these concerns as mere "rhetoric." GTE Opposition at 13. With all due respect, the Authority does not believe that it is for GTE (or this Commission) to evaluate (or second guess) the Authority's need to take steps to "insure the safe and efficient transportation of passengers and freight through the airport facility" see Shared Local Exchange Service, 1987 PUC Lexis 1410 * 18(Florida PUC). Some states have categorically exempted airports from STS regulation for precisely these reasons. Id. It may be that the situation with respect to the Greenway Toll Booth was the result of "erroneous assumptions" on the part of GTE personnel. GTE Opposition at 13. But that does not alter the paramount power of the Authority to exercise control over the activities (including telecommunications infrastructure activities) at Dulles in the interest of public safety. We do not contend that the Authority's operational imperatives override Section 68.3 of the Commission's rules or this Commission's responsibility to interpret and apply that rule. We do contend to that, to the extent that there is ambiguity in that rule, the Authority's

duties to ensure efficient operation and safety at Dulles are entitled to substantial deference.

Second, the Commission can and should take note of GTE's change of position in the application of its policy at Dulles. The entirety of discussions with GTE regarding the proposed purchase of GTE's cabling at Dulles was based upon the establishment of a demarcation at building 8. Not once during those discussions did GTE raise objection to this choice of a demarcation point. Attachment 1 to this pleading consists of two drafts of contracts, prepared by GTE lawyers, the later of which is described by its lawyers as "in executable form." Both designate building 8 as the demarcation point. It is not necessary to ascertain the motives that led GTE to abruptly change its position in April, 1995 and to shift its view as to the "proper" application of its demarcation policy.^{4/} At all events, if this course of conduct by GTE does not invalidate its claim that its policy is nondiscriminatory, it surely establishes the ambiguity of that policy and the reasonableness of the Authority's selection of a single demarcation point, at building 8.

Third, the Commission can and should take cognizance of the Authority's unique legal structure and powers. The Authority is not merely another property owner. It is a public body, corporate and politic, "independent of other bodies," created by the District of Columbia and Virginia through an interstate compact for the purpose of operating National Airport and Dulles according to certain defined "public purposes." Its regulations have the full force of law and specifically prohibit any construction or other

^{4/} See discussion supra at 4.

work on the airport without the “explicit written approval” of the appropriate officials of the Authority. See Attachment 2A to the Request for Declaratory Ruling at 4. The Authority's powers may well be sufficient to enable it to direct GTE to remove all of its existing cabling, and its central office,^{5/} from the Airport. The Virginia statute granting rights of way to telephone companies requires that the company obtain the consent of the “governing authority” before using “public” thoroughfares. Va. Code, § 56-458.^{6/} The authorizations granted to GTE (and its predecessors) years ago to run cabling and the lease for its central office at building 8 have long since expired or are on a month-to-month basis. Undeniably, GTE may provide service to any tenant wishing to take service from GTE. Whether GTE should be permitted to maintain cabling and a central office on property controlled by the Authority and if so, upon what terms and conditions, is quite another matter. Given its unique status and quasi-governmental powers, the Authority's determination that Dulles will be served best by a single demarcation point -- which is based upon a fair and reasonable reading of the Commission's rule, and not contradicted by GTE's demarcation policy -- is entitled to very substantial deference.

^{5/} The Authority is particularly concerned, and examining closely, the status of GTE's central office in view of GTE's representation that this office services 250 access lines to “residential and commercial customers located beyond” the Authority's property. The Authority's enabling legislation provides that it may authorize use of Airport property and facilities only for “Airport purposes.” See, DC Code § 7-1504(c)(2)

^{6/} We may also point out that the land at Dulles is owned by the United States Government, and as a general proposition, Federal Government lands are immune from eminent domain in any event.

II. GTE'S REMAINING ARGUMENTS ARE WITHOUT MERIT

GTE makes three claims which, although collateral to the issue presented here, may be thought to have some relevance to the determination of the demarcation point. The first is that the Authority is not the "premises owner" for purposes of Section 68.3. GTE Opposition at 6. The second is that, because Dulles comprises a "large geographic area" consisting of "numerous and diverse telecommunications customers" it ought not to be classified as a STS operation by the Virginia State Corporation Commission ("VSCC") and, therefore, ought to be outside the scope of Section 68.3 of this Commission's rules. GTE Opposition at 17-18. The third claim advanced by GTE is that this Commission "lacks authority" to grant the Authority's request for the declaratory ruling because a single demarcation point would constitute a taking of GTE's "property rights" in contravention of Commission powers. GTE Opposition at 24-25. Each of these arguments is utterly baseless.

A. The Authority Is The Premises Owner. GTE's claim that the Authority is not the "premises owner" for purposes of Section 68.3 is based upon the fact that the land at Dulles is owned by the United States Government and leased to the Authority, pursuant to its enabling legislation, for a 50 year term. It is apparently GTE's view that the Federal Government, not the Authority, is the entity responsible for demarcation point determinations. The answer is that the term "premises owner" employed in the Demarcation Order and the rule is not used in the technical sense of the entity that formally holds legal title to the land. The Commission was surely aware, when it adopted Section 68.3, that ownership of land, buildings and other improvements on land in this country take a variety of forms and that the holder of title to the land is not necessarily the

entity or individual with control and responsibility for the property and its improvements. There is not one word in the Demarcation Order that suggests that only the title holder to the land is to be considered the “premises owner.” Rather, the term was meant to signify the entity with control of the property and intra-system wiring and premises wiring. At Dulles, the Authority is that entity. It is, therefore, the “premises owner” for purposes of the rule.

B. Dulles Is Not A Local Exchange. There are several answers to GTE’s claim that Dulles Airport is simply too large and diverse to be treated as a single STS operation, and that, therefore, Section 68.3 is inapplicable. In the first place, there is no connection between the application of Section 68.3 and the characterization of Dulles Airport under the Virginia STS rules. The Commission’s demarcation rules apply and would apply here even if the Authority were not attempting to establish an STS operation at Dulles, and will continue to apply insofar as interstate service regardless of any change in VSCC policies or rules.^{2/} By its terms, the demarcation rules apply to “campus” operations; and Dulles surely is a campus.

Moreover, Dulles is not an ordinary campus. All of the operations at Dulles are dedicated to the common purpose of serving “aviation business or activities, or for activities necessary or appropriate to serve passengers or cargo in air commerce, or for nonprofit, public use” in accordance with the federal legislation authorizing the lease of

^{2/} The current Virginia rules specifically contemplate the establishment of STS systems at “airports.” See Request for Declaratory Ruling Exhibit 1 at 1

the facilities to the Authority.^{8/} We are submitting with the original of this Reply, an aerial photograph showing most of Dulles' property which makes this clear. From the airline fuel farms, to the car rental facilities, to the hotel -- and including the building GTE occupies for office and other support services -- all occupants are engaged in functions necessary or appropriate to the transport of passengers and freight in air commerce or non-profit purposes. All occupants of the airport operate pursuant to leases granted by the Authority or subleases approved by the Authority. GTE's attempt to paint the Dulles facilities as simply another local exchange area and outside the scope of Section 68.3 will not withstand examination.

C. GTE's Taking Claims Are Baseless. The Authority has repeatedly emphasized that GTE will be permitted to provide service to those tenants at the Airport who would like to take service from GTE.^{9/} The establishment of a demarcation point at building 8 (or anywhere else) has only to do with the allocation of responsibility and control of infrastructure on property governed by the Authority. The Town of Culpepper case (discussed at page 24 of GTE's Opposition) is thus entirely inapplicable here. In that case, the municipality was seeking to "retroactively" invoke its powers to require VEPCO to secure consent to use public rights of way in a recently annexed area; here the

^{8/} That legislation is set forth at 7-1501 et. seq. of the Code of the District of Columbia.

^{9/} While GTE has not publically acknowledged it in the pleadings filed with this Commission or the VSCC, it is apparently operating a STS system at the building that it occupied at the Airport. It is not our purpose to embarrass GTE in its corporate dealings or in its dealing with its sub-tenants in that building. That is why the so-called "Volner letter" acknowledges that there may be some circumstances in which it is willing to authorize GTE not only to provide service but also to maintain the existing infrastructure (on an unregulated basis) behind the demarcation point.

Authority's consent has expired and the question is whether it should be renewed.

Moreover, Culpepper was attempting to "oust" VEPCO entirely, even for those citizens who preferred its service to service from the municipal electrical system.^{10/} That is simply not the case here. The establishment of single demarcation point at building 8 simply will not "interfere" with GTE's intrastate service rights under its certificate.

GTE's related reliance on Bell Atlantic Telephone Companies v. FCC (cited at page 25 of its Opposition) is equally misplaced. The Authority's request for a single demarcation point has nothing whatsoever to do with either physical or virtual co-location, and does not in any sense "take" any of GTE's physical property on the Airport. That is why the Authority offered to purchase the property in the first instance and has specifically confirmed GTE's continued ownership of it, in light of GTE's determination not to sell. The establishment of the demarcation point at building 8 would alter the regulatory status of GTE plant remaining on the Airport side of the demarcation point. The introduction of STS service might also alter the economic value of that plant. That, surely, does not constitute a taking in any sense contemplated by the court in the Bell Atlantic Companies decision. There is not one word in that decision that calls into question the Commission's authority to define intra-system and premises wiring in accordance with its demarcation rules. The Commission has abundant authority to declare building 8 as the demarcation point without impairment of any legitimate or recognizable "property right" of GTE.

^{10/} In fact, the Authority owns the electric transmission facilities at Dulles, purchases power from VEPCO and retransmits that power to its tenants on a shared use basis.

CONCLUSION

We ask the Commission not to be misled by the sweeping and sometimes bewildering variety of claims that GTE has advanced in its opposition. There is only one issue for the Commission to decide: whether the Authority is entitled to insist upon a single demarcation point at the minimum point of entry of building 8. We have shown that this result is mandated by Section 68.3 and backed by considerations uniquely applicable to Dulles. We have shown that GTE's contrary contentions are without merit. The Declaratory Ruling should be granted.

Respectfully submitted.



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ATTACHMENT 1

over, or responsibility for, any portion of the cable system extending from the demarcation point to the Authority, tenants, and the travelling public at the Airport ("Airportside Cable System"). GTE shall continue to provide connectivity and dial tone to the point of demarcation as defined in this Agreement in accordance with its tariffs and operating procedures and shall have sole and exclusive control over all GTE-owned cabling and communications equipment located on the Airport that is not a part of the Airportside Cable System.

- c. GTE shall reasonably cooperate and consult with the Authority and its assigns with respect to the interconnection of the Airportside Cable System with GTE-owned telecommunications equipment and facility. Interconnection of the Airportside Cable System with GTE facilities shall be effected in such manner as the parties shall mutually agree and otherwise in accordance with Part 68 of the FCC rules applicable to multi-unit installations.
- d. This Agreement is subject to the Rules Governing Sharing Or Resale Of Local Exchange Service as promulgated by the Virginia State Corporation Commission and to GTE's Shared Tenant Service Tariff, filed with and approved by the Virginia State Corporation Commission. The Authority shall reasonably cooperate with GTE and its assigns with respect to the provision of facilities to serve Airport tenants who choose to be served directly by GTE. Reasonable cooperation shall include, but shall not be limited to, provision of facilities in sufficient time to allow GTE to meet standards of service established by the Virginia State Corporation Commission.

2. Purchase of Airportside Cable System

- a. GTE hereby assigns and conveys to the Authority all of its right, title and interest in and to the components that comprise the Airportside Cable System as more fully described and inventoried in Exhibit A.
- b. The Authority shall pay to GTE for the purchase of the Airportside Cable System as described in Exhibit A the sum of \$_____ ("Purchase Price"). The Purchase Price shall be payable in three installments as follows:
 - i. the sum of \$_____ upon execution of this Agreement;

- ii. the sum of \$ _____ thirty (30) days after execution of this Agreement.
 - iii. the sum of \$ _____ upon delivery of the Documents as defined in Section 2(d).
 - c. Payments are due ten (10) days after receipt of invoice and are late thirty (30) days after invoice date. The Authority shall pay interest on any past due balance at the lesser of 1½% per month or the maximum lawful rate.
 - d. GTE shall provide to the Authority complete cable-pair assignment records and cable drawings for the Airportside Cable System ("Documents") not later than sixty (60) days from the date of execution of this Agreement.
 - e. The Airportside Cable System being conveyed under this Agreement is limited to items listed in Exhibit A. GTE shall retain ownership of all of its telecommunications facilities on the Airport which are not listed in Exhibit A, including, but not limited to, central office equipment in Building No. 8, and interoffice and remote-host connecting cable facilities ("GTE-Owned Facilities"). The Authority agrees that it shall acquire no right, title or interest in GTE-Owned Facilities, including future additions thereto, and that GTE shall have the right to continuous and reasonable access to GTE-Owned Facilities for maintenance and service activities.
3. Effective Date; Conveyance of Title. The Effective Date of the Agreement shall be the date upon which the final payment of the Purchase Price and the Additional Equipment Purchase Price is made. Until such Effective Date title in and to the Airportside Cable System shall remain with GTE. Upon receipt of final payment, GTE shall execute such bills of sale or other instruments of conveyance as the Authority may reasonably require evidencing the transfer of title to the Airportside Cable System to the Authority as provided for in, and subject to the terms of, this Agreement.
4. Warranties, Representations and Limitations.
- a. GTE warrants and represents, to the best of its knowledge and belief, as of the date of this Agreement and as of the Effective Date that:
 - i. It is the sole owner of the Airportside Cable System, the conveyance of which to the Authority shall be free and clear of all liens, obligations



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December 13, 1994

Rheba C. Heggs, Esq.
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Dear Rheba:

Attached is a copy of the latest draft of the proposed Demarcation Point and Cable System Purchase Agreement. The document marked "7r" in the footer contains redline and strikeout markings to show the changes I negotiated with you and with Ian Volner today.

The document marked "7" is the same with the redline marks and the strikeout text deleted. This version is in executable form. Please advise me as soon as possible if any further changes are needed.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Frank", written in dark ink.

Franklin H. Deak

c:\wpilca\121394rb

Attachments

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ORIGINALS VIA AIRBORNE

A part of GTE Corporation

DEMARCATIION POINT AND CABLE SYSTEM
PURCHASE AGREEMENT

THIS AGREEMENT ("Agreement") is made between the Metropolitan Washington Airports Authority ("Authority") with principal offices at 44 Canal Center Plaza, Alexandria, Virginia 22314, and GTE South Incorporated ("GTE"), with offices at 13910 Minnieville Road, Woodbridge, Virginia 22193, P. O. Box 2346.

WHEREAS, the Authority is a body corporate and politic created by an interstate compact between the Commonwealth of Virginia and the District of Columbia and has been given the responsibility for the operation, maintenance, protection, promotion and development of, among other things, Washington-Dulles International Airports (hereinafter referred to as "Airport"); and

WHEREAS, GTE is a common carrier authorized to provide regulated telecommunications and telecommunications-related services in, among other places, the area that encompasses the Airport. In the course of providing such services, GTE and its predecessor have installed throughout the premises of the Airport a cabling system that is used and useful in the distribution of telecommunications services to and from the Authority, its tenants and the traveling public at the Airport; and

WHEREAS, the rules, regulations and policies of the Federal Communications Commission ("FCC") authorize that GTE and the Authority establish a "demarcation point" for the purpose of apportioning control and responsibility of communications equipment facilities and cabling on the Airport premises as between the Authority and GTE; and

WHEREAS, in accordance with the rules, regulations and policies of the FCC, the Authority and GTE wish to establish a demarcation point and the Authority wishes to purchase and GTE wishes to sell all of the in-place cable system on the Authority's side of the demarcation point, all on the terms and conditions hereinafter set forth.

NOW, THEREFORE, the parties agree as follows:

1. Establishment of Demarcation Point.

- a. The parties agree that there shall be a single demarcation point located on the line side of a new termination frame, to be installed at the Authority's additional expense, in Building No. 8 at the Airport.
- b. From and after the ~~Effective~~Closing Date of this Agreement, as defined at Section 3, GTE shall have no